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No. 98-230

# In the Supreme Court of the United States

OCTOBER TERM, 1998

AETNA LIFE INSURANCE COMPANY,

*Petitioner,*

*v.*

SHERRIE ACE,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

ANTHONY M. SHOLTZ
BETHANN B. CHAPMAN
*Faulkner Banfield*
*302 Gold Street*
*Juneau, AK 99801*
*(907) 586-2210*

PHILIP ALLEN LACOVARA
*Counsel of Record*
ANDREW L. FREY
JOHN J. SULLIVAN
*Mayer, Brown & Platt*
*2000 Pennsylvania Ave., N.W.*
*Washington, DC 20006*
*(202) 463-2000*

*Counsel for Petitioner*

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## REPLY BRIEF FOR PETITIONER

In attempting to avoid review of the important issues raised by this case, respondent disputes the applicability of this Court's controlling precedents, minimizes the inter-circuit conflict on the questions presented, and tries to mask the issues in a haze of fact-bound rhetoric. None of these tactics can withstand even minimal scrutiny.

The legal issues in this case are starkly presented and unburdened by factual nuance. The Ninth Circuit held unequivocally, in reversing the district court's new trial order, that:

> "'a stringent standard applies when the motion is based on insufficiency of the evidence.' * * * A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict 'is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result.'" App. 38a-39a (citations omitted).

This holding conflicts directly with *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 432-433 (1996), where the Court stated that "[t]he trial judge in the federal system, has discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence."

Moreover, the Ninth Circuit's holding conflicts directly with the decision in *Medcom Holding Co.* v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1996), which the Seventh Circuit has consistently followed. In that case the court recognized that the "trial judge in the federal system has discretion to grant a new trial if the verdict *appears against the weight of the evidence*" and added: "At one time we applied [the review] standard * * * more exacting[ly] when the district court granted a new trial because of the Seventh Amendment" but "in light of the Supreme Court's decision in *Gasperini* that an abuse of

discretion standard of review does not violate the Seventh Amendment * * * *we hereby abandon this practice* as unnecessary." *Ibid.* (emphases added).

The conflict on this important legal issue is not clouded by factual disputes that this Court would have to resolve. The district court reviewed the evidence at this modest trial in a written opinion. The Ninth Circuit reviewed the same evidence, applied its "stringent standard," and reached a different conclusion about whether Aetna was entitled to a new trial. Thus, this Court can resolve the principal legal issues presented solely on the basis of the written opinions of the courts below and decide whether the Ninth Circuit articulated and applied erroneous legal tests both for trial judges to use in deciding whether to grant a new trial and for appellate courts to use in reviewing new trial orders.

Review by this Court of these important issues is further compelled by the constitutional dimension of the case, which involves punitive damages liability. The Due Process Clause requires careful post-verdict scrutiny because "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420, 423 (1994). The Court should encourage trial judges to conduct this searching review of punitive awards and require appellate courts to defer to their determinations that a punitive verdict is against the weight of the verdict.

### A. The Ninth Circuit's Decision On The Legal Standard For New Trial Orders Conflicts With Decisions Of This Court And Other Circuits And Is Not Fact-Bound.

Respondent seeks to divert attention from the questions presented by raising a false question: whether an appellate court may "casually" or "lightly substitute its version of the facts for the jury's verdict" (Opp. 12). Aetna does not advocate that position. Aetna *does* object to the "stringent standard" applied by the Ninth Circuit in this case. Contrary

to respondent's argument (Opp. 13-16), not all of the circuits apply this standard and those that do are in conflict with decisions of this Court.

**1. This Court's Decisions Emphasize the Scope of Trial Judges' Discretion to Grant New Trials.** The Ninth Circuit's decision reversing the trial court's new trial order for Aetna applied a "stringent standard," under which it will not permit the trial court to exercise its discretion to grant a new trial based on the weakness of the evidence, unless the verdict is against the "great weight" of the evidence or is "seriously erroneous," and the court accords minimal deference to that determination. This legal standard, which as we demonstrated in the Petition (at 16-17) is also applied in some other circuits, clearly conflicts with decisions of this Court and of other circuits.[1]

Respondent cites this Court's decision in *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944), as supposedly supporting the proposition that appellate courts should "review extra carefully any order by a district court setting aside a verdict" (Opp. 16), and that "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable," 321 U.S. at 35. But that characterization

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[1] We noted in the Petition (at 14-15) that, as the Second Circuit held until recently, see *Binder* v. *Long Island Lighting Co.*, 57 F.3d 193, 201 (1995), it is questionable whether conditional new trial orders are reviewable at all despite the language of Rule 50(c). Respondent cites this Court's decision in *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), for the proposition that conditional new trial orders are reviewable (Opp. 11). But *Neely* did not involve application of Rule 50(c) to a conditional new trial order. Thus, the Court had no opportunity to address this question, as the subsequent conflict on the issue in the courts of appeals attests.

is misleading. In *Tennant* the Court was reviewing an order entering judgment notwithstanding the verdict (*ibid.*), which requires the trial judge to assume that every conflict in the evidence must be resolved in favor of the party who won the verdict. But this case involves a new trial order, which allows the trial judge to "weigh" the evidence to determine whether the verdict is consistent with the "fair weight" of the evidence. The Court's recent decision in *Gasperini* reaffirmed the breadth of the trial judge's discretion to order the case retried because the judge is not satisfied that the verdict is consistent with the weight of *all* the evidence.

Respondent objects that *Gasperini* is not relevant, arguing that the holding in that case is limited to judicial review of the *amount of damages* awarded to a plaintiff, but this case involves a new trial on *liability* (Opp. 18). But the Court's language in *Gasperini*, which is consistent with the Court's prior holdings (see Pet. 14 (citing cases)), is not so limited. According to *Gasperini*,

> "[t]he trial judge in the federal system, has *discretion* to grant a new trial if the verdict *appears* to [the judge] *to be against the weight of the evidence*. * * * This discretion *includes* overturning verdicts for excessiveness and ordering a new trial * * *." 518 U.S. at 432 (emphases added).

Thus, the broad discretion vested in trial judges and described in *Gasperini* "includes" setting aside excessive damages verdicts, but the power is not limited just to the amount of damages.[2]

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[2] Respondent erroneously states that Aetna did not call the *Gasperini* standard to the attention of the court of appeals (Opp. 18). In fact, Aetna cited to (and quoted extensively from) the governing standard articulated by this Court in *Gasperini* in its Opening Brief (at 38-41), Reply Brief (at 18), and Petition for

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Moreover, the decision in *Gasperini* removed any lingering Seventh Amendment concerns about allowing a trial court to exercise the full measure of its discretion to grant a new trial based on the weight of the evidence (518 U.S. at 432). This decision thus eliminated the constitutional basis for the many prior (and erroneous) decisions of the courts of appeals applying a "stringent standard" of review to new trial motions (see Pet. 16-17).

**2. The Ninth Circuit's Standard Conflicts With At Least the Seventh Circuit's.** In the wake of *Gasperini* the Seventh Circuit has expressly rejected its "more exacting" standard, see *Medcom Holding*, 106 F.3d at 1397, and now applies ordinary abuse-of-discretion review to new trial orders, which may be entered when "the verdict appears against the weight of the evidence." Respondent tries to minimize this clear conflict in the circuits by citing (Opp. 14) a *prior* opinion of the Seventh Circuit, which did not consider the issue or even cite *Gasperini*. See *Miskis* v. *Howard*, 106 F.3d 754, 757 (7th Cir. 1997). Moreover, even this prior decision noted that the Seventh Circuit in reviewing new trial orders "defer[s] to the district court because of its unique position to view the evidence and the course of the trial." *Ibid.*

Underscoring the Seventh Circuit's new approach, that court has repeatedly reaffirmed its decision in *Medcom Holding*, reiterating that a trial court has "wide discretion" in deciding a motion for a new trial. *Hulbert* v. *Wilhelm*, 120 F.3d 648, 656 (1997); see *To-Am Equipment Co.* v. *Mitsubishi Caterpillar Forklift America, Inc.*, ___ F.3d ___,

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[2] (...continued)
Rehearing and Suggestion for Rehearing *En Banc* (at 12) in the Ninth Circuit. This issue was more than adequately preserved for review by this Court.

1998 WL 452341 (7th Cir. Aug. 6, 1998) (review of new trial orders "is for abuse of discretion only").

Thus, for example, the Seventh Circuit recently *upheld* the trial judge's grant of a new trial because the verdict in a wrongful death suit was against the weight of the evidence. Citing both *Gasperini* and its own decision in *Medcom Holding*, the Seventh Circuit applied the "abuse of discretion" standard of review, explaining that "an abuse of discretion only occurs when no reasonable person could take the view adopted by the trial court" and that, in making that inquiry, the reviewing court "must give the benefit of every doubt to the judgment of the trial judge." *McClain* v. *Owens-Corning Fiberglass Corp.*, 139 F.3d 1124, 1126, 1128 (7th Cir. 1998) (citations omitted).

Thus, there is a clear split in the circuits on the legal standard governing new trial motions. The other decisions cited by respondent (Opp. 13-16), which do not reconsider the issue in light of *Gasperini*, merely add to the confusion among the circuits, as we described in the Petition (at 16-21). Respondent tries to denigrate the importance of the disarray, dismissing the varying legal standards as merely using "slightly different words" (Opp. 12-13). But "slightly different" formulations of a legal standard can have real consequences for litigants, as this case demonstrates (see Pet. 22-24; page 7, *infra*).

**3. The District Court Plainly Made a "Reasoned Analysis" of the Weight of the Evidence.** Respondent concedes that "'[w]here the district court makes a reasoned decision about the quantity and quality of the evidence supporting a verdict and decides a new trial is appropriate, the court of appeals should defer to the trial judge's assessment of the evidence'" (Opp. 20-21 (quoting Pet. 20-21)). The Ninth Circuit, however, did not apply this standard. Instead, it expressly applied a more "stringent standard" of

review and substituted its view of the weight of the evidence for the front-line trial judge's better-informed evaluation.

Respondent nonetheless contends that review by this Court is neither necessary nor appropriate because the district court did not offer a "carefully reasoned decision supporting a new trial" and that, in any event, the question whether the district court abused its discretion is "intensely fact specific" (Opp. 21-22). Neither argument is a plausible barrier to review.

The argument that the district court did not make a reasoned decision reviewing the evidence in granting Aetna's new trial motion simply ignores the extensive opinion the trial judge issued (Pet. App. 51a-63a). The judge addressed and resolved against respondent many of the factual issues that she now maintains were "undisputed" in her favor. For example, the district judge reviewed the evidence and, after an extensive discussion, concluded that, contrary to respondent's argument (see Opp. 5), Aetna did *not* apply an "illegal standard" to "deny benefits to Ace." Pet. App. 60a.

Thus, the district court's extensive opinion detailing the factual basis for its holding is all that is necessary to resolve the legal issue presented by this case: the appropriate legal standard governing the grant and review of new trial orders. There is no need for this Court to engage in any independent factual analysis. The issue to be resolved is whether the Ninth Circuit applied the proper legal standards to the factual analysis and conclusions of the district court.[3]

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[3] Indeed, it is for this very reason that Aetna is not seeking certiorari to review the Ninth Circuit's reversal of the district court's judgment as a matter of law for Aetna on respondent's claim for punitive damages (App. 37a). This is not a concession by Aetna on the merits, as respondent suggests (Opp. 2), but rather a recognition that the Ninth Circuit's decision on that issue

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**4. The Conflict Is Important.** In this case, the Ninth Circuit applied a legal standard that differs fundamentally from the standard the Seventh Circuit would have applied. The result was to deny Aetna a new trial that would have been sustained, if this case had arisen in the Seventh Circuit. It is fundamental to the rule of law in the federal system that correct and intelligible legal standards be applied fairly and uniformly across the nation. This Court should grant review to resolve the conflict on this important legal issue.

**B. This Case Presents The Court With An Opportunity To Clarify The Due Process Requirements For Post-Verdict Scrutiny of Punitive Liability Verdicts.**

This Court has held, in cases challenging the size of punitive damages verdicts, that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996); see also *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420, 423 (1994).

Respondent counters that these decisions are inapplicable here, because the Ninth Circuit agreed that the punitive damages verdict returned against Aetna ($16.5 million) was excessive and ordered a remittitur. See Pet. App. 40a-41a. But the fundamental principles of due process articulated by this Court — which require notice before *any* punishment is imposed — apply regardless of the amount of the monetary punishment imposed pursuant to a mere remittitur.

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[3] (...continued)
is fact-bound, even though an erroneous *application* of the correct legal standard of *de novo* appellate review. Aetna's decision not to raise this issue simply shows that Aetna is not, as respondent maintains (Opp. 20-23), seeking to raise any fact-bound issues for review.

In this case, the district court reviewed the evidence and found the record insufficient to impose *any* punitive liability on Aetna. As we explained in the Petition (at 24-26), the Due Process Clause counsels special deference before an appellate court may re-impose punishment that the trial judge found unwarranted.

The case thus presents the Court with the opportunity to address an important constitutional question raised by its previous punitive damages opinions but never squarely addressed.

**C. The Court Of Appeals Erred In Not Remanding The Case For Clarification Of The District Court's New Trial Order.**

Respondent's opposition to review of the third issue presented relies, in large measure, on a mischaracterization of Aetna's argument. Aetna does not contend that this Court should adopt an "inflexible rule always requiring an appeals court to remand for clarification when the district court does not explain" the grounds for its conditional new trial order. Opp. 29. Instead, Aetna urges a limited rule requiring a remand for clarification only when there is fair doubt about the grounds on which the district court relied and the appellate court only addresses and overrules a single ground. This is the settled practice in other circuits (see Pet. 29).

In this case, as we demonstrated in the Petition (at 27-29), the trial court's explanation of its reasons for a conditional new trial was adequate under Fed. R. Civ. P. 50(c)(1). If the explanation was not adequate, however, the Ninth Circuit erred in failing to remand the case and thereby created a conflict in the circuits on the necessity of a remand in this situation.

The court of appeals compounded its legal error by "inferring" a solitary ground for the new trial order among those relied on the trial court, and then finding that this

ground — the trial judge's view that the evidence was legally insufficient — was legally erroneous. If the appellate court was right that the trial judge had not adequately described his reasons for granting relief, the court could not perform its review function without ascertaining why the judge had entered the order.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANTHONY M. SHOLTY
BETHANN B. CHAPMAN
*Faulkner Banfield*
*302 Gold Street*
*Juneau, AK 99801*
*(907) 586-2210*

PHILIP ALLEN LACOVARA
*Counsel of Record*
ANDREW L. FREY
JOHN J. SULLIVAN
*Mayer, Brown & Platt*
*2000 Pennsylvania Ave., N.W.*
*Washington, DC 20006*
*(202) 463-2000*

*Counsel for Petitioner*

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